Supreme Court, U.S.
FILED
95-707 OCT 30 1995
OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

October Term, 1995

SAVANNAH FOODS & INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL UTILITY SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a plaintiff's motion for summary judgment which relies exclusively on inconclusive circumstantial evidence to establish an essential element of the claim shifts the burden of producing evidence to the defendant.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Savannah Foods & Industries, Inc.

National Utility Service, Inc.

There is no parent or subsidiary company to be listed.

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (App., *infra*, 13a-37a) is unreported and was affirmed in part, vacated in part without publication of the opinion by the United States Court of Appeals for the Third Circuit at *National Utility Service, Inc. v. Savannah Foods & Industries, Inc.*, 61 F.3d 895 (1995). (The opinion of the Court of Appeals is reproduced at Appendix 1a-8a.)

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was entered on June 29, 1995. The Court of Appeals denied petition for rehearing on August 1, 1995. This Court has jurisdiction to issue the requested writ of certiorari under 28 U.S.C. § 1254(1).

Subject matter jurisdiction in the District Court for the District of New Jersey was pursuant to 28 U.S.C. § 1332(a). Jurisdiction in the United States Court of Appeals for the Third Circuit was predicated upon 28 U.S.C. § 1291.

STATUTES INVOLVED

FED. R. CIV. P. 56(a) provides:

> (a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from

the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

FED. R. CIV. P. 56(c) provides:

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FED. R. CIV. P. 56(e) provides:

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a

> motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

A. Factual Background.

Petitioner Savannah Foods & Industries, Inc. ("Savannah") operates a large sugar refinery in Savannah, Georgia. Southern Natural Gas Company ("Southern") is an interstate pipeline that from 1981 to 1986 sold and transported natural gas to Savannah at Savannah's refinery. In October 1984, Savannah signed a contract with Respondent National Utility Service, Inc. ("NUS"), which the district court described as "the world's largest utility cost consultant" and which "employs approximately 1,100 people worldwide and maintains offices in eleven countries" (App. 14a), agreeing to pay NUS 50% of its energy cost savings for five years when such savings were a result of the adoption of a recommendation made by NUS. In April 1985 NUS sent a report to Savannah which stated in part:

> 4. In the event Southern Natural Gas expresses an unwillingness to renegotiate your contract, you should investigate ways of receiving your natural gas from various wellhead

> producers, depending on the outcome of FERC's hearing concerning "mandatory carriage."

At the time, Savannah had the capacity to use fuel oil, coal or natural gas interchangeably to run its refinery. In March 1986, following the adoption of Order 436 in October 1985 by the Federal Energy Regulatory Commission ("FERC"), Savannah advised Southern that its fuel oil prices had dropped to such levels that it intended to switch from natural gas to fuel oil. In response, Southern offered to seek a source of less expensive gas from wellhead sources and to provide the transportation of that gas to Savannah to prevent losing Savannah as a customer. On March 31, 1986, George A. Mattison, IV, a Southern official, stated:

> The plant's current gas load is primarily a boiler, which consumes about 10,000 Mcf per 5/day week. They [Savannah] told me that Southern Natural has been unable to match their #6 delivered price of $16.70 per barrel ($2.65 per MMBTU), and they are going to have to switch this load to oil immediately. They said that they would prefer to burn gas on this boiler if at all possible, but the economics favor oil at the moment.
>
> In addition, there is a 25,000 Mcf per week coal boiler at the plant, and Clark told me the energy cost is $1.85 per MMBTU on this load.
>
> I told Clark that we will immediately begin to seek a 7(c) source of supply for the plant and send a contract as soon as we have a proposal.

In May of 1986, Savannah signed an agreement for transportation services with Southern. Mattison's memorandum is direct evidence that Savannah's cost savings did not result from the adoption of the recommendation made in April 1985 by NUS.

The Court of Appeals affirmed a summary judgment in favor of NUS finding as a matter of law that Savannah adopted and acted on the April 1985 recommendation and that cost savings resulted therefrom. However, the savings were the result of Southern's offer to transport gas for Savannah to replace sales that Southern would otherwise have lost to Savannah's alternate fuels.

B. Basis of Federal Jurisdiction in the Court of First Instance.

NUS invoked the jurisdiction of the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1332(a).

REASONS FOR GRANTING THE WRIT

By drawing the inference based on inconclusive circumstantial evidence on a motion for summary judgment in favor of the moving party which had the ultimate burden of proving that the transportation of wellhead gas by Southern to Savannah pursuant to a May 1986 contract was the *result* of a recommendation made by NUS in April 1985, and by choosing to disregard substantial evidence of materially different regulatory and market conditions that intervened between April 1985 and March

1986, the Court of Appeals for the Third Circuit (i) has decided an important question of federal law which has not been, but should be, settled by this Court; (ii) has decided a federal question in a way that conflicts with applicable decisions of this Court; and (iii) has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a district court as to call for the exercise of the Supreme Court's power of supervision.

A. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, to wit: whether a plaintiff's motion for summary judgment which relies exclusively on inconclusive circumstantial evidence to establish an essential element of the claim shifts the burden of producing evidence to the defendant.

In 1986 this Court reviewed three federal summary judgment cases: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). This trilogy of cases has been taken to encourage the use of FED. R. CIV. P. 56 by the federal courts, but almost ten years later the summary judgment standards established by those cases continue to generate disputes and inconsistent and unpredictable results. The instant case is an example of a Court of Appeals' application of the standards articulated in *Anderson, Celotex* and *Matsushita* to a summary judgment motion made by the party with the affirmative burden of proof. None of the

1986 cases involved a plaintiff with the burden of proof as the moving party.

According to the Court of Appeals' decision, Savannah will be required to pay in excess of $4,500,000.00 without benefit of a plenary trial solely because of inferences, based on circumstantial evidence, on the question of causation, drawn in favor of the moving party with the ultimate burden of proving causation. NUS "was to be paid a percentage of the cost savings resulting from adoption of its recommendations" (App. 2a). In summarizing the facts, the Court of Appeals noted the April 26, 1985 report which contained the recommendation, FERC's approval of Southern's Customer Transportation Program on July 2, 1985, a letter dated August 9, 1985 from Savannah to NUS in which Savannah informed NUS that it was "negotiating with Southern," a letter dated September 11, 1985 from Savannah to Southern seeking "to determine how [Savannah] can best approach the use of transportation gas," and finally, eight months later, a transportation agreement dated May 9, 1986 between Savannah and Southern (App. 2a-5a). None of these events or documents provide direct evidence that the April 1985 recommendation resulted in cost savings. The Court of Appeals' opinion deferred to the "comprehensive opinions" of the district court (App. 6a); however, the district court made the identical inference in favor of the moving party with the burden of proof. This decision infers causation in favor of the plaintiff on the plaintiff's motion for summary judgment and uses FED. R. CIV. P. 56(c) to shift the plaintiff's burden of proof on an essential element of the cause of action.

The district court's opinion purports to rely almost exclusively on the summary judgment standards expressed in *Anderson, Celotex* and *Matsushita*. The Court of Appeals' opinion cites no supporting authority except the statute and cases regarding post-judgment interest which are not relevant to this Application and merely defers to the district court's opinion. Each of the three 1986 decisions reviewed summary judgments in favor of moving parties which did not have the burden of proof on the decisive issues. In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), an anti-trust action, the defendant moved for summary judgment. This Court recognized that inferences are to be viewed in the light most favorable to the non-moving party (the plaintiff in that case) in deciding a motion for summary judgment but that "anti-trust law limits the range of permissible inferences from ambiguous evidence in a § 1 [Sherman Act] case." *Id.* at 488. On defendant's motion for summary judgment, the plaintiff was required to show that the inference was reasonable in the factual context of the case, and that an inference which made no economic sense would not be sufficient to defeat the defendant's motion. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), a libel case governed by state law and federal constitutional issues, the defendant moved for summary judgment. In that case substantive law required the plaintiff to prove malice by "clear and convincing" evidence, and this Court held that such standard of proof must be taken into consideration in determining whether to grant the defendant's motion for summary judgment. More pertinent to the case at hand, the Court noted that the moving party (the defendant) "has the burden of

showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing, in turn, evidence that would support a jury verdict." *Id.* at 256. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court held that a summary judgment motion could be granted to a defendant even though the motion was not supported by affidavits or other similar materials negating the plaintiff's claim. This Court stated that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion against a plaintiff who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Id.* at 322.

Celotex established the rule that the moving party is not required to produce evidence on an issue upon which the nonmoving party bears the ultimate burden of proof, but the moving party need only point out that the nonmoving party has no evidence on the issue. The burden then shifts to the nonmoving party who is required to respond with evidence of "specific facts showing that there is a genuine issue for trial." 477 U.S. at 324. Later cases have been consistent. *E.g., Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990). *Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390 (4th Cir. 1994), *cert. denied, Novatel Computer Systems, Inc. v. Cray Communications, Inc.*, 115 S. Ct. 1254 (1995), demonstrates that the moving party has no burden of producing evidence at all when the motion for summary judgment is based on an issue upon which the non-moving party bears the ultimate burden of proof.

However, this Court has never addressed the summary judgment standards that apply when the party with

the burden of proof is the movant, and it should do so at this time. Some lower courts have expressly recognized the important distinction between the standard for granting summary judgment to a moving party with the burden of proof and the standard for granting summary judgment against a nonmoving party with the burden of proof. *E.g., Anchorage Associates v. V.I. Bd. of Tax Review,* 922 F.2d 168, 175 (3rd Cir. 1990); *Local Union 42 v. Absolute Environmental Serv., Inc.,* 814 F.Supp. 392 (D. Del. 1993); *Vigars v. Valley Christian Center,* 805 F.Supp. 802, 805 (N.D. Cal. 1992); *Hickson v. Home Federal of Atlanta,* 805 F.Supp. 1567, 1574 (N.D. Ga. 1992), *aff'd,* 14 F.3d 59 (11th Cir. 1994). When the moving party will have the burden of proving the claim at trial it must produce evidence showing the absence of a genuine issue on every element of the claim. *Hickson, supra. Watts v. United States,* 703 F.2d 346 (9th Cir. 1983), recognized that Rule 56(c) is not intended to shift the ultimate burden of proof from the plaintiff to the defendant.

In this case NUS was the plaintiff and the moving party with the burden of proving that cost saving was the result of its recommendation. On a motion for summary judgment the plaintiff's burden is to establish that fact conclusively as a matter of law. The lower courts inferred such causation from a circumstantial chain of events that occurred during a thirteen month period from April to May 1985 in which material intervening events occurred and despite the eight month period between September 11, 1985, when the last circumstantial event relied on by the lower courts occurred, and May 9, 1986 when the transportation agreement was signed.

During this same time period changing regulatory and economic conditions unrelated to NUS's recommendation led Southern to adopt a program to provide transportation of wellhead gas to its customers which was different from what NUS advised in its recommendation in April 1985 (i.e., awaiting the outcome of FERC's hearing concerning mandatory carriage). On December 24, 1984, FERC had issued a Notice of Inquiry in Docket No. RM85-1-000, 50 Fed. Reg. 114 (1985), which led to FERC Order 436 issued on October 9, 1985. *See* Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (1985). Order 436 provided for optional blanket authorization pursuant to Section 311 of the Natural Gas Policy Act for an interstate pipeline to transport gas for others if the pipeline offered non-discriminatory, open access transportation to all its customers. *See* 50 Fed. Reg. 42,408 (1985). According to the Court of Appeals for the District of Columbia Circuit, Order 436 "envisages a complete restructuring of the natural gas industry. . . . At stake is the role of interstate natural gas pipelines." *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d 981, 993 (D.C. Cir. 1987). If Order 436 was to be effective, "the pipelines will transport the gas with which their own sales compete." *Id.* at 994. Southern chose not to offer open access transportation pursuant to Order 436 because to do so would result in the loss of its ability to sell its own higher priced gas and increase its liabilities under its long-term procurement, "take or pay," contracts.[1] By not offering open access transportation

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[1] "The Commission has concluded that a prevailing pipeline practice – particularly their general refusal to transport

Southern was able to continue to sell its high priced gas to its captive customers, and to its fuel-switchable customers as long as its gas prices were competitive with alternative fuels. Providing open access transportation would have enabled those customers to substitute cheaper wellhead gas for Southern's gas.

In late 1985 and early 1986, fuel oil prices began dropping to levels that caused Southern to lose sales to customers that had the ability to switch to fuel oil in place of Southern's higher priced natural gas. Savannah was such a customer. In 1986, Southern applied for individual certificate authority to transport gas for 186 customers, including Savannah. *See* Southern Natural Gas Co., 36 F.E.R.C. 61,212 (1986). In that year, Southern obtained individual certificates of authority from FERC to transport gas to *all of its major customers*. *See* Southern Natural Gas Co., 35 F.E.R.C. 61,334 (1986), Southern Natural Gas Co., 35 F.E.R.C. 61,374 (1986) *and* Southern Natural Gas Co., 36 F.E.R.C. 61,062 (1986). Savannah was one of Southern's major customers. *See* Southern Natural Gas Co., 36 F.E.R.C. 61,212 (1986). Mattison's memorandum dated March 31, 1986, stating that Savannah was "going to have to switch to oil immediately" because Southern "has been unable to match" the price of oil, is direct evidence that Savannah's gas cost savings did not result from the adoption of a recommendation made in April 1985.

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gas for third parties where to do so would displace their own sales . . . has caused serious market distortions." *Associated Gas*, 824 F.2d at 993.

B. The Court of Appeals has decided an important question of federal law in a way that conflicts with an applicable decision of this Court.

In 1992 this Court held in *Kodak v. Image Technical Services*, 504 U.S. 451 (1992), that the plaintiff, with the burden of proving market power in an anti-trust case, was entitled to the inference of market power on the defendant's motion for summary judgment because the defendant could not demonstrate that the inference was unreasonable. In the present case the nonmoving defendant, Savannah, is entitled to the reasonable inference that its cost savings did not result from the adoption of the alleged recommendation in the absence of direct evidence to the contrary.

The summary judgment standard under FED. R. CIV. P. 56 "mirrors the standard for a directed verdict under" FED. R. CIV. P. 50(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Various federal appeals courts have clearly indicated that it is error to direct a verdict based on circumstantial evidence in favor of a plaintiff with the burden of proof unless such evidence *requires* reasonable jurors to reach one conclusion. *See, e.g., Coplay Cement Co., Inc. v. Willis & Paul Group*, 983 F.2d 1435 (7th Cir. 1993); *Adams-Arapahoe School Dist. No. 28-J v. GAF Corp.*, 959 F.2d 868 (10th Cir. 1992); *Amarin Plastics Inc. v. Maryland Cup Corp.*, 946 F.2d 147 (1st Cir. 1991); *City Nat'l Bank of Fort Smith v. Unique Structures, Inc.*, 929 F.2d 1308 (8th Cir. 1991); *Huff v. Standard Life Insurance Co.*, 683 F.2d 1363 (11th Cir. 1982). This Court should grant the writ of certiorari in this case and settle the rule that a summary judgment may not be granted to a plaintiff with the burden of proof based on circumstantial evidence unless

such evidence is conclusive and requires, as a matter of law, an inference in the plaintiff's favor.

C. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a district court as to call for the exercise of this Court's power of supervision.

With due respect to the Court of Appeals, that court, after quoting "recommendation 4," actually rewrote the recommendation to support a summary judgment in favor of NUS. The Court of Appeals stated that "the *implication* of recommendation 4 is that whereas Southern was supplying Savannah with Southern's own natural gas through Southern's own pipelines, Savannah's contract with Southern might be limited to providing for Southern to transport wellhead gas that Savannah purchased from other producers" (emphasis added) (App. 3a-4a). Thus, the Court of Appeals has held that NUS, which undertook for pay to make a recommendation, is, on its own summary judgment motion, entitled to a favorable "implication" from what its report actually said. The actual clear and unambiguous language of "recommendation 4" expressly says something else, and that express language does not support a judgment in favor of NUS.

The rule that a court may not rewrite a contract, alter the terms, supply essential terms, or eliminate wording used by the parties is fundamental and universal. *See, e.g., Okaw Drainage Dist. of Champaign and Douglas County, Ill. v. National Distillers and Chemical Corp.*, 882 F.2d 1241

(7th Cir. 1989); *Phico Ins. Co. v. Providers Ins. Co.*, 888 F.2d 663 (10th Cir. 1989); *Towers Hotel Corp. v. Rimmel*, 871 F.2d 766 (8th Cir. 1989); *Woods v. Dravo Basic Materials Co., Inc.*, 887 F.2d 618 (5th Cir. 1989); *Mathewson Corp. v. Allied Marine Industries, Inc.*, 827 F.2d 850 (1st Cir. 1987); *Helitzer v. Helitzer*, 761 F.2d 582 (10th Cir. 1985); *N.L.R.B. v. Superior Forwarding, Inc.*, 762 F.2d 695 (8th Cir. 1985); *Quad Const., Inc. v. Wm. A. Smith Contracting Co., Inc.*, 534 F.2d 1391 (10th Cir. 1976).

CONCLUSION

Petitioner respectfully requests the Court to grant this petition, issue a writ of certiorari to the United States Court of Appeals for the Third Circuit and reverse its decision.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5644

NATIONAL UTILITY SERVICE, INC.

v.

SAVANNAH FOODS & INDUSTRIES, INC.,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-02891)
District Judge: Honorable William G. Bassler

Submitted under Third Circuit LAR 34.1(a)
June 27, 1995

Present: MANSMANN, GREENBERG and SAROKIN, *Circuit Judges*

OPINION OF THE COURT
(Opinion filed: June 29, 1995)

GREENBERG, *Circuit Judge.*

National Utility Service, Inc. brought this diversity of citizenship action against Savannah Foods & Industries, Inc. to recover payment on a contract under which Savannah promised to pay National 50% of energy cost savings resulting from recommendations made by National and adopted by Savannah. The district court had jurisdiction because Savannah is a Delaware corporation with its

principal place of business in Georgia, National is a New Jersey corporation with its principal place of business in New Jersey, and the amount in controversy exceeded $50,000, exclusive of interest and costs.

We summarize the facts. National is in the business of providing consultant services on utility costs. On October 26, 1984, Savannah and National entered into a utility cost consulting contract under which National was to submit recommendations for savings and refunds on energy costs to Savannah which, if it accepted, it could then implement. National was to be paid a percentage of the cost savings resulting from adoption of its recommendations.

Pursuant to the agreement, Savannah submitted information which National utilized in preparing a report, dated April 26, 1985, outlining certain approaches to reducing natural gas expenditures. App. 19-27. The report indicated that Savannah's gas contract with Southern Natural Gas Company provided for Savannah to pay for natural gas at a price tied to the market price of oil. App. 19. Inasmuch as the market price of natural gas then was decreasing faster than that of oil, the report pointed out that the contract price for gas was actually higher than the market price. *Id.* The report also noted, "Although mandatory carriage is not currently required, we believe the Southern Natural Gas Company would consider renegotiating your current contract in order to keep a satisfied client and avoid your converting to alternate fuel sources." *Id.*

The report then listed five approaches to accomplish the potential costs reductions:

1. An alternate fuel oil price methodology can be made available to you (see enclosed report) which would effectively reduce the price under your present contract terms.

2. A renegotiated contract can be based on the Southern Natural Gas Company's alternate rates. Under their Contract Demand Service Rate Schedule (OCD Series), you could effectively reduce your price of natural gas by as much as 51¢ per MMBTU. Savings would also exist on the utility's General Service, G series or their Authorized Overun Service, AO series.

3. A modified contract could be negotiated with the floor and ceiling prices to keep your costs more in tune with natural gas market conditions while taking into consideration your alternative fuel capacity.

4. In the event Southern Natural Gas expresses an unwillingness to renegotiate your contract, you should investigate ways of receiving your natural gas from various wellhead producers, depending on the outcome of FERC's [Federal Energy Regulatory Commission's] hearing concerning "mandatory carriage".

5. Further investigation into alternate fuels should continue as per attached fuel oil report.

Id. 19-20. "Mandatory carriage" refers to proposed regulations requiring natural gas companies to provide, at a non-discriminatory rate, for transmission of gas not owned by them through their pipelines. In essence, the implication of recommendation 4 is that whereas Southern was supplying Savannah with Southern's own natural gas through Southern's own pipelines, Savannah's contract with Southern might be limited to providing for

Southern to transport wellhead gas that Savannah purchased from other producers. National attached a draft letter from Savannah to Southern to the report indicating an interest in renegotiating their current contract. *Id.* 27.

David Brown, the National analyst who wrote the report, repeatedly communicated with his contact at Savannah, Orrin K. Rudd, Jr. to follow up on this report. Rudd informed Brown that Savannah had decided to convert to coal and therefore recommendation number 4 was "redundant." App. 778. On July 2, 1985, the Federal Energy Regulatory Commission approved Southern's application for the Southern Customer Transportation Program, which was filed on April 17, 1984. This program allowed customers to purchase gas directly from wellhead producers and transport it through Southern pipelines.

On August 9, 1985, Rudd informed Brown that Savannah was negotiating with Southern on their natural gas contract. Brown requested information on these negotiations but received nothing. Thereafter, Brown made several requests for information on Savannah's negotiations with Southern, but had little success.

In a letter dated September 11, 1985, Eugene G. Clarke, Chief Engineer – Refineries of Savannah, contacted Southern "trying to determine how [Savannah] can best approach the use of transportation gas." On May 9, 1986, Savannah entered into a transportation agreement with Southern providing for Southern to transport to Savannah gas which Savannah would acquire from SNG Trading Inc. pursuant to a separate agreement.

On or about December 18, 1986, National became aware of these agreements and on January 23, 1987, it sent a bill to Savannah for the savings resulting from them. On February 23, 1987, Rudd responded to National's invoice, stating that it was not National's but Savannah's engineering department that had achieved these savings. National took exception to that response. Notwithstanding Rudd's February 23, 1987 letter, Savannah sent two checks to National, though it objected at one point to the specific amount National claimed. Soon after, however, Savannah demanded a refund, claiming that it paid National by mistake because the engineering group had achieved the savings.

National brought this case to recover the remainder of the 50% of the cost savings which it claimed Savannah had achieved through its recommendation. Savannah counterclaimed for the refund of the money it had paid. The district court granted summary judgment for National and denied Savannah's cross-motion for summary judgment in a comprehensive memorandum opinion and an accompanying order of September 9, 1994. In that opinion the court denied without prejudice National's application for prejudgment interest, but in another memorandum opinion and accompanying order of December 14, 1994, it awarded prejudgment interest at the rate of 9%, as provided in New York law which it found applicable. That order also provided that postjudgment interest would run at the rate of 9%. Savannah has appealed from the orders of September 9, 1994, and December 14, 1994. We have jurisdiction under 28 U.S.C. § 1291.

We may divide Savannah's contentions into three categories, those going to liability and damages on the contract, and those relating to prejudgment interest and postjudgment interest. After a careful review of this matter, we have concluded that the district court reached the correct result on the issues relating to liability, damages, and prejudgment interest. Accordingly, inasmuch as it rendered comprehensive opinions on these points, we do not address them except in one respect. We note that Savannah dismisses National's advice as being "worthless platitudes." In this regard, we observe that it does not appear that National's suggestion to separate the supply and transportation aspects of Savannah was particularly complex. Nevertheless, this relatively simple idea when put into practice effectuated a large savings and, under the agreement, Savannah cannot avoid its liability by the device of characterizing the suggestion by a pejorative term.

We do address, however, the court's order that Savannah pay postjudgment interest at a rate of 9%. Although the district court did not cite the authority under which it made this determination, it apparently adopted that rate because it was the rate allowed under New York law for prejudgment interest.

In this ruling it erred. In a diversity of citizenship action, state law governs the allowance of prejudgment interest as well as its rate. *Salas v. Wang*, 846 F.2d 897, 909 n.13 (3d Cir. 1988). But the rate of postjudgment interest is determined by federal law. *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 474 U.S. 819, 106 S.Ct. 68 (1985). 28 U.S.C. § 1961 provides that the postjudgment interest rate shall be

"equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment."

While National contends that Savannah waived its contention with respect to the postjudgment interest rate, we reject that argument as the district court determined the postjudgment interest rate on a motion seeking prejudgment interest. Thus, Savannah did not have an opportunity to object. Consequently, we will vacate the order for postjudgment interest and remand it so that an order can be entered that postjudgment interest be calculated as provided in 28 U.S.C. § 1961.

The orders of September 9, 1994, and December 14, 1994, will be affirmed, except that the provision for postjudgment interest at the rate of 9% in the December 14, 1994 order is vacated, and the matter is remanded to the district court for entry of an amended order providing for interest to be calculated under 28 U.S.C. § 1961. In this regard we suggest that the court reconsider when prejudgment interests ends and postjudgment interest begins because 28 U.S.C. § 1961(a) provides that interest runs on a judgment from the date of its entry, in this case September 12, 1994, according to the docket sheets. Yet the order of December 14, 1994, provides for prejudgment interest to run until September 15, 1994, and postjudgment interest to run starting September 16, 1994. Costs are allowed to National on this appeal.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Morton I. Greenberg
Circuit Judge

DATED: JUN 29 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5644

NATIONAL UTILITY SERVICE, INC.

v.

SAVANNAH FOODS & INDUSTRIES, INC., *Appellant*

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil No. 91-2891)

Present: MANSMANN, GREENBERG, and SAROKIN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) June 27, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court entered September 12, 1994, and December 19, 1994, be, and the same are hereby affirmed, except that the provision for post-judgment at the rate of 9% in the December 14, 1994 order (entered December 19, 1994) is vacated, and the cause remanded to the said District Court for entry of an amended order providing for interest to be calculated under 28 U.S.C. § 1961 and for such further consideration as may be required. Costs taxed in

favor of National. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

June 29, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL UTILITY SERVICE, INC.,

Plaintiff,

v.

SAVANNAH FOODS & INDUSTRIES, INC.,

Defendant.

Civil Action No. 91-2891(WGB)

ORDER

(Filed Sep. 9, 1994)

This matter having come before the Court on a motion by the Defendant, Savannah Foods & Industries, Inc., ("Savannah") for Summary Judgment and a Cross-Motion for Summary Judgment by Plaintiff, National Utility Service, Inc., ("NUS"); and

The Court having reviewed the briefs and other documents submitted by the parties for this motion and having heard the oral argument of counsel; and

For the reasons set forth in the Court's opinion filed on this date; and

For good cause shown;

It is on this 9th day of September, 1994 ORDERED as follows:

1. Savannah's motion for Summary Judgment is hereby DENIED;

2. NUS's Cross-Motion for Summary Judgment is hereby GRANTED;

3. Judgment shall be entered in favor of NUS and against Savannah in the amount of $2,973,289.35, exclusive of interest;

4. NUS's request for interest on the judgment is hereby DENIED, without prejudice; and

5. Savannah's counterclaims are hereby DISMISSED.

/s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL UTILITY SERVICE, INC.,

Plaintiff,

v.

SAVANNAH FOODS & INDUSTRIES, INC.,

Defendant.

Civil Action No. 91-2891(WGB)

OPINION

(Filed Sep. 9, 1994)

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Attorneys for the defendant

BASSLER, DISTRICT JUDGE:

This matter comes before the Court on a motion by the defendant, Savannah Foods & Industries, Inc. ("Savannah"), a Delaware Corporation with its principal place of business in Savannah Georgia, for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiff, National Utility Service, Inc., ("NUS"), a New Jersey corporation, the successor in interest to a New York corporation of the same name as a result of a January 1, 1988 merger, Cross-Moves for Summary Judgment. Savannah is licensed to do business in New Jersey. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332.

For the reasons stated below, the Court will deny Savannah's Motion for Summary Judgment and grant NUS's Cross-Motion for summary judgment.

I. BACKGROUND

NUS is the world's largest utility cost consultant and has been in business for over sixty years. (Frankel Aff., ¶ 4). It employs approximately 1,100 people worldwide and maintains offices in eleven countries. (*Id.*) Savannah is in the business of producing, among other things, refined sugar. (Compl. ¶ 6).

On October 26, 1984, NUS and the defendant, Savannah entered into a utility cost consulting contract (the "Agreement") under which NUS, aside from an initial fee, would be compensated only to the extent that Savannah "acted upon" and "implemented" NUS's recommendations on reducing energy costs. (Frankel Aff., Ex. 2).

NUS was to receive a percentage of the amount saved as a result of its recommendations. NUS's action seeks to recover what it considers to be the balance of the fee owed by Savannah under the Agreement.

The Agreement provides as follows:

> (1) We [Savannah] hereby authorize you [NUS] to submit recommendations for all possible savings and refunds on our energy costs. . . . You will make a detailed analysis of all factors in our costs and advise where refunds and reductions can be obtained.
>
> (2) Your initial examination will cover the past twelve (12) months' bills. Where applicable, you will review our old bills as far back as possible for refunds. Your continuing analysis will cover our current bills, which we will send you each month during the term of this agreement.
>
> (3) Any recommendation you make is subject to our approval. Any recommendation acted upon by us shall be deemed accepted and if implemented, we will pay you as outlined below after such savings and refunds are achieved. We will promptly forward all information pertaining to your recommendations for your evaluation and further advice.
>
> (4) All negotiations with suppliers are to be conducted by us unless it is mutually agreed otherwise.
>
> (5) We agree to pay you as follows . . .
>
> b. After recapture of our service fee we will pay you fifty (50%) percent of each refund secured. We shall also pay you fifty (50%) percent of each savings secured for a

> period of sixty (60) months after which the entire savings will be ours.

(Frankel Aff., Ex. 2; NUS's 12G Stat., ¶ 11). In compliance with the terms of the Agreement, NUS generated a report, dated April 26, 1985, on Savannah's energy needs and consumption (the "April 1985 Report"). (Frankel Aff., Ex. 18; Savannah's 12G Stat., ¶ 6; NUS's 12G Stat., ¶ 22-25).

In the April 1985 Report, NUS informed Savannah that the natural gas price was between $2.80 and $3.00/MMBTU,[1] significantly less than Savannah was paying its current supplier of natural gas, Southern Natural Gas Company ("Southern"). NUS recommended that Savannah renegotiate its contract with Southern and, failing that, "investigate ways of receiving [its] natural gas from various wellhead producers, depending on the outcome of FERC's [Federal Energy Regulatory Commission's] hearing concerning 'mandatory carriage.[2]' " (Frankel Aff., ¶ 21; and Ex. 18).

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[1] Million British Thermal Units.

[2] The full text of the recommendation reads as follows:

> (4) In the event Southern Natural Gas expresses an unwillingness to renegotiate your contract, you should investigate ways of receiving your natural gas from various wellhead producers, depending on the out-come of FERC's hearing concerning "mandatory carriage."

(Frankel Aff., Ex. 18). "Mandatory Carriage" would have required that natural gas companies serve as common carriers of gas owned by end-users, on a non-discriminatory basis.

At the time of the April 1985 Report, Savannah was paying Southern both for the natural gas and the transportation of the natural gas. NUS's suggestion was intended to allow Savannah to either: (1) renegotiate the contract with Southern to obtain a better overall price, (since NUS believed that Southern would want to keep Savannah as a client in light of the deescalating natural gas prices and the importance of Savannah's business as the second largest direct line natural gas consumer in Georgia); or (2) investigate "receiving" the natural gas from a wellhead producer at a lower price and relegating Southern to the position of providing only transportation services and not the actual product. (Frankel Aff., ¶ 30). A draft letter from Savannah to Southern was proffered with the April 1985 Report seeking renegotiation of Savannah and Southern's natural gas contract. (*Id.*, Ex. 18).

During the months that followed the April 1985 Report, Savannah entered into negotiations with Southern regarding alternative fuels. (*Id.*, ¶¶ 49-63). In early July, 1985, Southern's application for the Southern Customer Transportation Program, which had been pending since April 17, 1984, was approved. (NUS's 12G Stat., ¶ 37; Frankel Aff., ¶ 44). This allowed direct customers such as Savannah to receive their gas directly from the wellhead producers, using Southern for its transportation services only. (*Id.*)

On September 11, 1985, Eugene G. Clark, Chief Engineer – Refineries of Savannah, wrote to Southern "trying to determine how we can best approach the use of transportation gas." (NUS's 12G Stat., ¶ 70; Frankel Aff., Ex.

37). From this time until May of 1986, Savannah negotiated with Southern regarding its use of natural gas, while concomitantly NUS was making inquiries of Savannah on this very issue, but apparently receiving little or no response. (Frankel Aff., ¶¶ 49-63).

NUS alleges that Savannah officials, cognizant of their Agreement with NUS and the natural gas recommendation contained in the April 1985 Report, stonewalled NUS and consciously made an effort to exclude NUS from the Savannah/Southern negotiations. On May 9, 1986, Savannah entered into a contract with Southern for transportation of gas which Savannah purchased from the wellhead producers (the "Southern Agreement"). (NUS's 12G Stat., ¶ 87; Frankel Aff., ¶ 63 and Ex. 50).

On January 23, 1987, NUS, having become aware that Savannah had obtained a cost savings by means of the renegotiated deal with Southern on its natural gas service, sent a letter demand for payment under the Agreement. (NUS's 12G Stat., ¶ 94; Frankel Aff., Ex. 54). After initially denying any liability, claiming that Savannah achieved the savings independently from NUS, Savannah made two payments and then on April 27, 1988, Savannah wrote to NUS requesting a refund, again claiming that the money saved by renegotiating with Southern, was the result of the work of Savannah's Engineering Group, and not NUS. (NUS's 12G Stat., ¶ 98-103; Frankel Aff., Ex. 6).

NUS filed a three-count complaint against Savannah on July 2, 1991. Count's [sic] One and Two seek damages for breach of contract and unjust enrichment, respectively.

Count Three requests a declaratory judgment of the rights of the parties under the Agreement.

Savannah now moves for summary judgment, claiming that it never made use of NUS's "recommendations," if its April 1985 Report even qualifies as such, and furthermore, that it is not responsible to pay any share of cost savings it gained as a result of changes it made in its utilities services, since those savings resulted from the work of its own engineering department.

NUS cross-moves for summary judgment, claiming that Savannah did, in fact, make use of the natural gas recommendation, and is indebted to NUS in an amount totaling 50% of the savings.

NUS seeks a judgment in the amount of $4,048,469.08, representing 50% of the savings ($6,048,846.44 – $3,024,424.22 = $3,024,424.22) less the $51,134.87 paid, for a balance of $2,973,289.35, and including interest from September 1, 1986, the date the savings began, in the amount of $1,075,180.75. (*See* NUS's 12G Stat., ¶¶ 105 and 106).

II. DISCUSSION

A. The Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Whether a fact is material is determined by the applicable substantive law.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue involving a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1219 n.3 (3d Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989).

The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party satisfies this requirement, the burden shifts to the nonmoving party to present evidence that there is a genuine issue for trial. *Id.* at 324. Once the moving party has carried its burden of establishing the absence of genuine issues of material fact, the nonmoving party "may not rest upon mere allegations or denials" of its pleading, Fed. R. Civ. P. 56(e), but must produce sufficient evidence to reasonably support a jury verdict in its favor, *Anderson*, 477 U.S. at 249, and not just "some metaphysical doubt as to material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In deciding a summary judgment motion, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. In determining whether any genuine issues of material fact exist, the Court must resolve "all inferences, doubts, and issues of credibility . . . against the moving party." *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983), *cert. dismd.*, 465 U.S. 1091 (1984) (*citing Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972)).

B. The Choice of Law

In a diversity case, a federal district court must apply the choice of law rules of the state in which it sits. *Klaxon Co. v. Stentor Manufacturing Co.*, 313 U.S. 487, 496 (1941). The general rule in New Jersey is that the law of the place of the contract governs the choice of law, especially when that place has a "significant relationship . . . with the parties and the transaction." *State Farm Mut. Automobile Ins. Co. v. Estate of Simmons*, 84 N.J. 28, 37 (1980); *Bell v. Merchants and Businessmen's Mut. Ins. Co.*, 241 N.J. Super. 557, 561-63 (App. Div.), *certif. denied*, 122 N.J. 395 (1990). Under New Jersey law, a contract is formed when the last act necessary for the formation of the contract is performed, and the formation is complete at the place of that final act. *Mullaly v. Carlisle*, 177 F.Supp. 588, 592 (D.N.J. 1959); *Filson v. Bell Tel. Laboratories, Inc.*, 82 N.J. Super. 185, 190 (App. Div. 1964); *M.N. Axin Co. v. Gibralter Dev. Inc.*, 45 N.J. Super. 523 (App. Div. 1957); and *Arco Welding & Mach. Works, Inc. v. Terry Contracting, Inc.*, 44 N.J. Super. 586 (App. Div. 1957).

Savannah argues that the following facts militate in favor of applying Georgia law to this contract dispute: (1) NUS maintained a sales representative in Georgia; (2) NUS delivered the executed contract to Savannah in Georgia; (3) NUS delivered all the reports containing recommendations to Savannah in Georgia; and (4) NUS's representatives visited Savannah in Georgia. (Savannah's Br. in Supp., at 8).

NUS argues that New York law should apply because: (1) Savannah sent an offer to NUS in New York, where it was accepted, executed and then posted to

Savannah in Georgia; (2) the parties intended that NUS perform its services in New York; and (3) no services were performed in Georgia.

The Court finds that the nature of the services called for in the contract and the fact that the acceptance and posting transpired in New York indicate that the place of contract was New York. The Court will, therefore, apply New York law to this contract dispute.

C. The Parties' Asserted Positions

The business relationship between NUS and Savannah, as memorialized in the Agreement, can be divided into four parts: (1) NUS would investigate economical means of supplying Savannah with the energy necessary to run its facilities based upon information provided by Savannah and NUS's employees' expertise in the area; (2) NUS would make reports and recommendations to Savannah accompanied by a draft letter, to be transferred to Savannah's letterhead, and subsequently sent to the recommended utility for the purpose of changing Savannah's services; (3) Savannah would use NUS's letter and send a blind copy to NUS, so that NUS would know that Savannah had used one of its ideas and that it would be entitled to a share of the cost savings; and (4) once the cost savings were calculated, which, in this case, NUS claims amounts to in excess of $6,048,846.00, NUS would be paid its contractual share. (Frankel Aff., Exs. 2 & 18).

The following facts are undisputed. The parties signed the Agreement on October 29, 1994 [sic] and Savannah paid a $7,500.00 retainer and provided NUS with materials and information regarding its current operations.

NUS analyzed Savannah's energy usage and generated a Report dated April 26, 1985. Savannah received the Report. Parts one and two were, therefore, completed. Part three, Savannah's use of the form letter, was never performed. NUS is now seeking to enforce the final part of the arrangement and collect its contractual fee because it argues that Savannah made use of one of its recommendations.

The "recommendation" which NUS argues triggered its entitlement to a fee, was contained in the 1985 Report from NUS to Savannah. (*Id.*, Ex. 18). The Report specifically stated:

> (4) In the event Southern Natural Gas expresses an unwillingness to renegotiate your contract, you should investigate ways of receiving your natural gas from various wellhead producers, depending on the out-come of FERC's hearing concerning "mandatory carriage."

(Frankel Aff., Ex. 18). Southern's authorization to act as a carrier for wellhead producers was being debated at that time and a hearing was scheduled before the Federal Energy Regulatory Commission ("FERC"). In light of the fact that Southern obtained permission to serve as an intermediary for transportation fuel, NUS claims that this language constitutes a "recommendation" that Savannah purchase natural gas for its Savannah sugar refinery at the wellhead and ship it directly to the refinery through Southern's interstate pipeline.[3]

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[3] Savannah had been supplied with natural gas through Southern's direct pipeline since 1981, pursuant to a contract which was subject to periodic amendments.

The recommendation was accompanied by draft correspondence designed to be used by Savannah in communicating its desire to renegotiate its natural gas service with Southern. (*Id.*, Ex. 18). Savannah argues that the suggestion contained in the April 1985 Report does not constitute a valid "recommendation," because it failed to include such relevant and necessary information as: (1) where such gas could be found; (2) its cost; (3) how it could be transported; (4) who was both willing and capable of transporting it; (5) what role Southern, with whom Savannah was already under contract, would have in this kind of service and purchase arrangement; (6) the relative costs of transportation; and (7) the reliability of the sources and the transportation. Moreover, Savannah argues that the "recommendation" itself was not clearly identified.

In addition, Savannah argues that conflicting information provided by NUS in its "Cost Analysis Report," dated February 12, 1985, states that NUS had completed its initial analysis "in accordance with the agreement," and that after "special scrutiny," NUS concluded that Savannah was "benefitting from the most appropriate rates and terms available" in its natural gas service.

In support for its position that the April 1985 Report is inadequate as a recommendation, Savannah argues that information is only valuable as "consideration" for purposes of contractual liability, where it is "novel." Under New York law, "[w]ithout novelty, no property right exists in plaintiff, and there is no consideration giving rise to defendants' obligation." *Granoff v. Merill Lynch & Co., Inc.*, 775 F.Supp. 621, 627 (S.D.N.Y. 1991). Savannah argues that NUS's suggesting in its April 1985 Report that

Savannah "investigate" ways of receiving natural gas from various wellhead producers," without providing any additional information, "was no more novel than suggesting that one turn out his lights to save on energy costs." (Savannah's Br., at 32).

NUS argues in opposition, that: (1) the suggestion contained in the April 1985 Report constitutes a "recommendation" within the meaning of the Agreement; (2) its agreement to provide specialized services to effectuate its recommendation was sufficient consideration to support the Agreement; (3) the Agreement is unambiguous and should be enforced as written; (4) there are genuine issues of material fact regarding Savannah's negotiations with Southern and whether or not Savannah's actions were in response to NUS's recommendations or its own independent actions, which preclude summary judgment in Savannah's favor; (5) there are no genuine issues of material fact regarding Savannah's breach of contract, its unjust enrichment and the amount of savings to which NUS is now entitled, so summary judgment should be entered in NUS's favor; (6) Savannah's counterclaims for the $51,134.87 it paid to NUS should be dismissed as it was tendered to NUS as part of a valid and enforceable contract; and (7) the factual assertions made by Savannah cannot be considered as they are not made by parties on their factual knowledge in violation of Federal Rule of Civil Procedure 56(e).

Each of these asserted arguments will be discussed below.

1. Consideration

As a preliminary matter, the Court will address the parties arguments regarding the consideration necessary to support the contract. "To form a valid contract, there must be a person able to contract, a person able to be contracted with, a thing to be contracted for, sufficient consideration, clear and explicit words to express the agreement and assent of both contracting parties." *Tuition Plan, Incorporated v. Zicari,* 70 Misc.2d 918, 335 N.Y.S.2d 95 (2d Dist. 1972). In this argument, Savannah challenges the "sufficiency of the consideration afforded by NUS."

"The propositions are basic that a contract to be enforceable must be supported by a valid consideration or there must exist at the time of its inception mutuality of obligation." *Dennis Realty Corporation v. Twersky,* 190 Misc. 936, 76 N.Y.S.2d 798 (1st Dist. 1947); In *Topken, Loring & Schwartz, Inc. v. Schwartz,* 249 N.Y. 206, at page 211, 163 N.E. 735, at page 736, 66 A.L.R. 1179, the New York Court of Appeals stated that:

> the contract for its consideration rests upon mutual promises. One of the promises may or may not be good, the same as if a discretion were left to one of the parties to perform or not perform. Under such circumstances there is no consideration, and the contract cannot be enforced.

Id.

Savannah argues that under the decision in *Granoff v. Merill Lynch & Co., Inc.,* 775 F.Supp. at 627, NUS's idea to buy natural gas directly from the well-head is insufficient consideration to support a contract because it is not

"novel." In *Granoff*, the United States District Court for the Southern District of New York entered summary judgment against a developer of the idea of "portfolio protection insurance," which would use insurance to provide to an investor an unconditional guarantee that portfolio would not lose more than a stated percentage of the investment.

The plaintiff had brought an action against a brokerage firm and related parties for breach of contract, misappropriation of idea, and fraud and misrepresentation, alleging that the brokerage firm used his idea in creating a growth and guarantee fund. On the motion of the brokerage firm and related parties for summary judgment, the District Court, held that: (1) the developer could not recover damages for use of confidentially disclosed ideas in absence of novelty; and (2) the developer failed to create genuine issue of material fact on issues of novelty, similarity, and use of idea to avoid entry of summary judgment against him. *Id.*, 775 F.Supp. at 627.

The District Court held that "to meet the requirement of minimal consideration, even actions on express contracts must involve the use of an idea which is novel. Without novelty, no property right exists in plaintiff, and there is no consideration giving rise to defendants' obligation." *Id.* (citing *Educational Sales Program, Inc. v. Dreyfus Corp.*, 65 Misc.2d 412, 414, 317 N.Y.S.2d 840 (1970)).

"It is clear, however, that an idea if valuable, may be the subject of contract. While the idea disclosed may be common or even open to public knowledge, yet such disclosure if protected by contract, is sufficient consideration for the promise to pay." *High v. Trade Union Courier*

Pub. Corp., 31 Misc.2d 7, 69 N.Y.S.2d 526, 529 (N.Y. Sup. 1946) *aff'd* 275 A.D.2d 803, 89 N.Y.S.2d 527 (1st Dept. 1949) (citing *Keller v. American Chain Co.*, 255 N.Y. 94, 174 N.E. 74; *Gellert v. Dick*, 277 N.Y. 123, 13 N.E.2d 603; and *Bristol v. Equitable Life Assurance Society*, 132 N.Y. 264, 30 N.E. 506, 28 Am.St.Rep. 568).

In *Granoff*, the suit was based upon the sale of an idea by the plaintiff to the defendant. In order for such a sale contract to be enforceable, it is clear that the idea being sold had to have value, and value in that context is measured by novelty. In this case, NUS was not marketing a specific idea to a company it sought to have buy the idea. NUS was marketing a service and payment for the work performed was largely contingent upon Savannah's subsequent use of the information and ideas generated by NUS's employees.

To apply Savannah's *Granoff* argument in the context of this case would be to suggest that an attorney representing someone in a contingent fee case should not be paid for his or her services and ideas if his or her litigation strategy turns out to be an obvious one. Savannah's argument would be more appropriate in a situation where that same attorney sent a letter to other law firms advising them of his or her obvious litigation strategy and when those firms begin using it, suing those firms to collect some consultation fee suggested in the letter.

In short, this is not an intellectual property suit, but a suit on a service contract. NUS is not seeking a property interest in the idea of purchasing natural gas directly from the well-head, but payment on a consulting contract which Savannah agreed to pay. The rule in *Granoff* is,

therefore, simply not applicable here. *C.f. Woman Golfer, Inc. v. Meredith Corp.*, 792 F.Supp. 211 (S.D.N.Y. 1992).

Additionally, as NUS argues, the contract called for additional services beyond suggesting ideas to Savannah. NUS performed an analysis based upon information provided by Savannah, made recommendations based upon that analysis and its knowledge of the industry, and further offered to follow those recommendations with assistance in negotiating new deals with the suppliers. These things, both separately and in combination, amount to adequate consideration to support the Agreement.

2. The Enforceability of the Agreement

Savannah also argues that the Agreement cannot be enforced because its language and that of its partial fulfillment, the Report, is ambiguous.

As stated previously, New York law applies to the interpretation of the Agreement upon which NUS' breach of contract suit is based. Under New York law, the construction of a contract is for the court when its terms are unambiguous and there are no extrinsic facts to affect its construction. *National Utility Service, Inc. v. Whirlpool Corporation*, 325 F.2d 779, 780 (2d Cir. 1963). The Court must first interpret the provisions of the contract in order to determine whether they are ambiguous.

The Court finds it important to note the distinction between *construction* of a contract, "a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and

from a legal policy or policies that are applicable to the situation," and *interpretation* of a contract, "endeavoring to ascertain the meaning or meanings of symbolic expressions used by the parties. Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. R. 833, 835 (1964).

In order to ascertain whether the Agreement is ambiguous, the Court must interpret its provisions. Once that has been done, the Court can then engage in construction of the contract so that it can be properly enforced.

Savannah claims that the language of the Agreement is ambiguous and permits more than one fairly reasonable interpretation and that summary judgment in favor of NUS is thus inappropriate. *See Aetna Casualty & Surety Co. v. Geiesow*, 412 F.2d 468, 471 (2d Cir. 1969). *See also*, e.g., *Grand Union Co. v. Cord Meyer Development Corp.*, 735 F.2d 714 (2d Cir. 1984). NUS, on the other hand, interprets the contract to mean that all recommendations made by NUS that were subsequently acted upon by Savannah give rise to obligations under the contract. The Court agrees with NUS, finding that the Agreement is not ambiguous and that the parties are bound by its provisions.

The Agreement specifically states that "[a]ny recommendation [NUS] make[s] is subject to [Savannah's] approval. Any recommendation acted upon by [Savannah] shall be deemed accepted and if implemented, we will pay you as outlined below after such savings and refunds are achieved. We will promptly forward all information pertaining to your recommendations for your

evaluation and further advice." (Frankel Aff., Ex. 2). The Court finds this to be a facially simple and unambiguous expression of agreement between the parties.

Under New York law, "[i]f a contract is determined to be unambiguous on its face, absent the presence of any colorable defenses to its enforcement, it will be upheld according to its terms." *Beltrone Const. Co., Inc. v. State*, 592 N.Y.S.2d 832, 834 (A.D. 3rd Dept. 1993). As the Court finds the Agreement to be facially unambiguous, the Court must enforce it according to its terms, absent a colorable defense. *Id.* at 834. The Court must, therefore, analyze the defenses raised by Savannah in order to determine whether any of them are colorable.

The Court has already found the consideration and ambiguity defenses unavailing. Savannah has also argued, however, that the Agreement is inapplicable here, because the purchase of natural gas directly from the well-head was its own idea and was a natural consequence of work performed by Savannah's own people.

NUS argues, and the Court agrees, that it makes no difference what Savannah did to reduce its utility expenses after it entered into the Agreement with NUS. Once the Agreement was executed, Savannah worked independent of NUS at its own risk. The Agreement clearly indicates that Savannah was paying NUS to work on saving it money on its utility expenses. The Agreement requires that NUS need only make a recommendation in order to qualify for payment if its recommendation was thereafter successfully used by Savannah.

Savannah could have modified the Agreement in order to protect it from having to pay NUS for reduction projects in which it was already engaged, such as was done in *National Utility Service, Inc. v. Whirlpool Corporation*, 325 F.2d 779 (2d Cir. 1963), in which Whirlpool modified the same form contract as was used in this case by adding the paragraph: "At our St. Joseph, Michigan plant we are in the process now of increasing our power factor from 88% To 100% And reductions in our gas rates for processing and heating, therefore, these items are not to be included in your computations of rate reductions." Savannah had ample opportunity to alter the Agreement to ensure that it not be held liable for duplicative work performed by both NUS and Savannah's engineering department, but it failed to do so. It is now bound by the contract it made.

Moreover, if Savannah believed that it had already taken all the steps necessary to obtain the less expensive natural gas from the wellhead and have it transported by Southern, it should have rejected NUS's recommendation, as it had a right to do by virtue of the approval clause. The Agreement stated that "[a]ny recommendation acted upon by [Savannah] shall be deemed accepted and if implemented" NUS becomes entitled to the savings payment. *See National Utility Service v. Callahan Mining Corp.*, 799 F.Supp. 1004, 1005 (N.D.Cal. 1990).

Savannah also argues that the recommendation contained in the Report does not constitute an adequate "recommendation" within the meaning of the Agreement. The Agreement specifically provides that Savannah "hereby authorize[s] [NUS] to submit *recommendations* for all possible savings and refunds on our energy costs."

(Frankel Aff., Ex. 2; NUS's 12G Stat., ¶ 11) (emphasis added). In fulfillment of its obligations under this portion of the Agreement, NUS submitted the Report which suggested that Savannah renegotiate its contract with Southern. The Report then went on to state that:

> (4) In the event Southern Natural Gas expresses an unwillingness to renegotiate your contract, you should investigate ways of receiving your natural gas from various wellhead producers, depending on the out-come of FERC's hearing concerning "mandatory carriage."

(Frankel Aff., Ex. 18). Although this language suggests a contingent plan, the fact remains that it constitutes a suggested course of conduct which Savannah ultimately employed successfully. Moreover, Savannah began to make payments on what it obviously at one time believed to be a manifest obligation resulting from its actions regarding this recommendation. The plain language of the Agreement and the Report, combined with Savannah's assumption of payments, convinces this Court that NUS complied with its obligations under the Agreement and supplied what can fairly be termed a "recommendation."

3. Sufficiency of NUS's Actions

Savannah attempts to argue that the Agreement required NUS to offer more than was contained in the April 1985 Report in order to qualify for payment under the Agreement. There is, naturally a requirement of good faith and fair dealing in every contract, but there is nothing in the record to indicate that NUS did anything

but fulfill its obligations under the Agreement as best it could in light of the materials Savannah gave it. Quite to the contrary, the facts in the record indicate that it was Savannah, not NUS, that should be concerned about its good faith obligations under the Agreement. *See National Utility Service, Inc. v. Blue Circle, Inc.*, 793 F.Supp. 52 (N.D.N.Y. 1992).

A covenant of good faith and fair dealing is implied in every contract governed by New York law. *National Utility Service, Inc. v. Blue Circle, Inc.*, 793 F.Supp. at 55 (citing *Leberman v. John Blair & Co.*, 880 F.2d 1555, 1560 (2d Cir. 1989); and *Filner v. Shapiro*, 633 F.2d 139, 143 (2d Cir. 1980)). That covenant precludes each party from engaging in conduct that will deprive the other party of the benefits of their agreement. *Id.*

It is apparent in the record that Savannah has not dealt fairly with NUS and has not acted in compliance with its obligations under the Agreement. Savannah neither rejected the recommendation nor cooperated by providing all the information it was required to provide; NUS offered to assist Savannah in its negotiations with Southern and to provide further analysis if necessary. Savannah chose not to accept NUS's offer of further assistance. Savannah cannot now assert that NUS failed to comply with the Agreement by virtue of the fact that Savannah failed to comply with its own obligations. *See National Utility Service, Inc. v. Blue Circle, Inc.*, 793 F.Supp. at 56.

4. Accord and Satisfaction

Savannah's argument that the $51,134.87 payment made to NUS constitutes an accord and satisfaction is undermined by William W. Sprague, Jr.'s letter of April 27, 1988, in which Sprague, Savannah's president, states that:

> Consideration of this project by our Engineering Group was begun prior to any recommendations made by National Utilities. Payments made to you for savings ostensibly accomplished with your assistance were made in error and should be refunded.

(Frankel Aff., Ex. 6).

It is clear that Savannah never intended those payments to be an accord and satisfaction of any debt under the Agreement, but sought then and is continuing to seek to regain that money. Without intent, there can be no accord and satisfaction. *Jacoby and Meyers v. Crispi*, 613 N.Y.S.2d 13 (A.D. 1st Dept. 1994).

D. Savannah's Breach of Contract

The Court finds that Savannah has breached its Agreement with NUS and, as a result, NUS is entitled to recover one-half of the total savings realized by defendant for the 60 months referenced in the Agreement, running from August 31, 1986 through July 30, 1991.[4]

---

[4] The Agreement stipulates that Savannah would be sharing any covered savings from the date they first appeared on Savannah's bills. (Frankel Aff., Ex. 2).

According to the undisputed calculations of NUS, the amount of the savings totals $6,048,846.44 and is the "difference between the actual billing and what the billing would have been, but for the change" in the utility services used by Savannah. (*See Allied Supermarkets, Inc. v. National Utility Service Inc.*, Civil Action No. 32336 (E.D. Mich. 1974) (NUS's Br., App. B, at 5). The Court will, therefore, enter judgment in favor of NUS in the amount of $2,973,289.35, representing 50% of the savings obtained by Savannah for the 60-month period running from October 26, 1984 through October 26, 1989, less the $51,134.87 already paid.

NUS also requests that the Court award prejudgment interest. Under New York law, pre-judgment interest should begin to run from the earliest ascertainable date the cause of action existed. N.Y.Civ.Prac.L. § 5001(b). NUS claims that this date should be September 1, 1986 and that the interest should amount to $1,075,180.75. NUS's calculation of prejudgment interest is unsubstantiated and no affidavit, certification or declaration presently in the record supports its $1,075,180.75 interest calculation. (*See* NUS's 12G Stat., ¶¶ 105 and 106). The Court will not, therefore, at this time enter an award of interest. The Court will deny the request for interest without prejudice to NUS renewing its application with properly substantiated proof of the amount of the interest.

The Court further finds that the defendant's counterclaim for recovery of the $51,134.87 amount already paid must be denied due to its breach of the Agreement and failure to show non-compliance by NUS with the contract terms. *National Utility Service, Inc. v. Blue Circle, Inc.*, 793 F. Supp. at 56. Plaintiff fully performed its obligation

under the Agreement by analyzing the submitted utility bills and recommended that Savannah purchase natural gas from the wellhead producers. In addition, the $51,134.87 has been subtracted from the amount which Savannah is obligated to pay under the Agreement. The Court will, therefore, dismiss Savannah's counterclaim. *Id.*

III. CONCLUSION

For the reasons discussed above, the Court denies Savannah's motion for summary judgment and grants NUS's cross-motion for summary judgment. The Court will enter a judgment in favor of NUS in the amount of $2,973,289.35 and dismiss Savannah's counterclaims for the $51,134.87 already paid. The Court will deny, without prejudice, NUS's claim for prejudgment interest. An appropriate order follows.

Dated: September 9, 1994

/s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL UTILITY SERVICE, INC., Plaintiff, v. SAVANNAH FOODS & INDUSTRIES, INC., Defendant.	Civil Action No. 91-2891 (WGB) ORDER

This matter having been opened to the Court by Kurzman Karelsen & Frank, attorneys for plaintiff National Utility Service, Inc. ("NUS") by a timely motion, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to amend the Judgment entered by the Clerk of this Court on September 12, 1994; and

The Court having reviewed the briefs and other documents submitted by the parties; and

For the reasons set forth in the Court's Opinion filed on this date; and

For good cause shown;

IT IS on this 14th day of December, 1994, ORDERED, as follows:

1. The motion of NUS to amend the Judgment entered the 12th day of September, 1994, is hereby GRANTED;

2. The Judgment for the plaintiff and against the defendant hereby is amended to provide that in addition to the provisions therein, NUS shall have interest thereon to September 15, 1994, which interest is assessed in the sum of $1,342,776.68, and further interest from September 16, 1994 until the date of payment, at the rate of nine (9%) percent per annum.

/s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NATIONAL UTILITY SERVICE, INC., Plaintiff, v. SAVANNAH FOODS & INDUSTRIES, INC., Defendant.	Civ. No. 91-2891 (WGB) MEMORANDUM OPINION

APPEARANCES:

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Attorneys for Defendant

BASSLER, DISTRICT JUDGE:

Plaintiff, National Utility Services, Inc. ("NUS"), has moved to alter or amend this Court's judgment, filed September 9, 1994, pursuant to Federal Rule of Civil Procedure 59(e). Plaintiff seeks to amend the judgment, which awarded summary judgment in the amount of $2,973,289.35, to include prejudgment interest. In Plaintiff's motion for summary judgment, it had requested an award of interest; however, this Court denied the request, without prejudice. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332.

I. DISCUSSION

On this motion to alter or amend judgment, the scope of actual disagreement between the parties is extremely small. The parties agree that New York law governs and that Plaintiff is entitled to prejudgment interest as a matter of law in this breach of contract action. N.Y. Civil Practice Law and Rules ("CPLR") § 5001(a). In addition, the parties agree that the applicable rate of interest is 9%. CPLR § 5004. The sole point of contention between the parties is the relevant date from which the prejudgment interest should be calculated. As a result, the Court will confine its discussion to that issue.[1]

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[1] In a letter dated October 21, 1994, Defendant objected to Plaintiff's submission of a "Reply Affidavit of David M. Brown" on two grounds. First, Defendant argued that the Affidavit was replete with legal arguments and conclusions in violation of Local Rule 27A. The Court agrees that much of the affidavit violates Local Rule 27A. Rather than make a determination as to

Regarding the date from which prejudgment interest should be calculated, New York law provides as follows:

> Interest shall be computed from the earliest ascertainable date the cause of action existed, except that damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

CPLR § 5001(b).

In the Opinion of September 9, 1994, this Court found that Defendant, Savannah Foods, Incorporated, ("SFI") had breached its contract with NUS. Under the terms of the contract, NUS agreed to make recommendations to SFI on how SFI could reduce its energy costs. Brown Aff., Exh. 2, ¶ 1. SFI was obligated to send NUS copies of its utility bills each month. Brown Aff., Exh. 2, ¶ 2. In exchange for NUS' services, SFI agreed to pay "50% of each refund secured . . . [as well as] 50% of each savings secured for a period of 60 months . . . " Brown Aff., Exh. 2, ¶ 5b. Moreover, SFI agreed that "payment [would] be made upon receipt of your [NUS'] invoice showing computation of savings and/or refunds." Brown Aff., Exh. 2, ¶ 5c.

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which portions of the affidavit must be stricken, however, the Court simply has not relied upon it. In so doing, the Court has mooted Defendant's second objection, that submission of an affidavit in support of a reply brief is improper under the Local Rules.

According to Plaintiff, the terms of the contract reflect the parties' intention that NUS would bill SFI monthly, after determining the amount of savings generated by NUS' recommendations, based upon a review of SFI's monthly utility bills. Therefore, Plaintiff argues, NUS' cause of action accrued 45 days after August 31, 1986, the date of the first utility bill on which SFI realized savings as a result of NUS' services. Brown Aff. ¶ 11. Plaintiff incorporated the 45 day lag time between SFI's receipt of the August 31, 1986 bill and accrual of the action in order to account for the time that it would have taken NUS to review SFI's bill and to submit an invoice to SFI for payment, if SFI had submitted its utility bills to NUS as provided under the contract. Brown Aff. ¶¶ 6, 9.

In contrast, Defendant argues that the contract's reference to "a period of 60 months", Brown Aff., Exh. 2, ¶ 2b, and a singular "invoice", Brown Aff., Exh. 2, ¶ 2c, indicates that SFI was not obligated to pay NUS until the end of the five year contract term. Defendant claims that its interpretation of the contract is supported by NUS' manner of performance. SFI contends that NUS only sent it one invoice, on January 22, 1987. Frankel Aff., Exh. 54. According to Defendant, all other invoices, which were prepared by NUS while this case was pending, are "bogus", and SFI has never conceded their authenticity. Tatum Aff. Exh. B.

This Court is not persuaded by Defendant's selective reading of the contract. In the September 9, 1994 Opinion, this Court found that SFI breached its obligations by failing to provide NUS with the information required under the contract. Furthermore, Defendant has failed to contest Plaintiff's evidence that SFI failed to provide the

information necessary for NUS to bill SFI. Brown Aff. ¶ 11. Under these circumstances, Defendant's suggestion that NUS' failure to bill SFI on a monthly basis evidences the parties' intent to delay payment until the end of the five year contract term is extremely implausible. *See Kruger v. Page Management, Inc.*, 432 N.Y.S. 2d 295, 306-07 (Sup. Ct. 1980). Moreover, SFI's own conduct belies its interpretation. SFI remitted two payments to NUS in April and September, 1987, Brown Aff., ¶ 14, Exh. 3. *See Canick v. Hick*, 505 N.Y.S. 652 (N.Y. App. Div. 1986) (directing that where contract terms are ambiguous, "the construction placed upon them by the parties themselves may be considered in ascertaining the meaning of the ambiguous term).

Based upon the text of the contract as well as the conduct of the parties, the Court concludes that the parties contemplated payments by SFI to NUS on a monthly basis and not at the end of the five year contract term.

As an additional objection, Defendant argues that Plaintiff's cause of action did not accrue until it first demanded payment from SFI in March, 1991. Under CPLR § 5001(b), prejudgment interest is calculated from the date of accrual, not the date when payment is demanded. *Quantum Chemical Corp. v. Reliance Group, Inc.*, 580 N.Y.S. 275 (N.Y. App. Div. 1992). In addition, the terms of the agreement provided that payment was due upon SFI's receipt of NUS' invoice. Brown Aff., Exh. 2, ¶ 5c. Consequently, Defendant's argument that prejudgment interest should be calculated from the date of demand is similarly without merit.

Therefore, the Court concludes that Plaintiff's cause of action accrued 45 days after August 31, 1986, the date of the first utility bill on which SFI realized savings as a result of NUS' services.

Since Plaintiff incurred damages "at various times", during the contractual term, the CPLR provides two methods for calculating the amount of prejudgment interest, either "computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date". CPLR § 5001(b). Following CPLR § 5001(b), Plaintiff has submitted calculations under each of these methodologies. Brown Aff. Using the first methodology, Plaintiff has calculated the interest based upon the unpaid amounts due NUS each monthly billing cycle, with a result of $1,342,776.68 in prejudgment interest. Brown Aff., ¶¶ 12-17, Exh. 3. As a second method, Plaintiff selected a "reasonable intermediate date" of January 31, 1989, which marked the half-way point of the five year contract term. Brown Aff. ¶ 11. This second method yielded a total of $1,471,778.00.

Although the second methodology is permitted under the CPLR, it is somewhat arbitrary. The Court finds it unnecessary to adopt it here. Plaintiffs have been able to calculate the interest due on SFI's obligations, as they accrued each month. Since this monthly calculation more accurately reflects the billing cycle contemplated by the parties when they formed the contract, the Court ratifies this method. Defendant has not contested Plaintiff's calculation using this methodology. Consequently, the Court accepts its calculation that SFI owes NUS $1,342,776.68 in prejudgment interest, which includes credit for payments made by SFI. Brown Aff., ¶¶ 12-17, Exh. 3.

III. CONCLUSION

For the reasons stated in this Opinion, the Court concludes that Defendant, SFI, has not created even "a metaphysical doubt" regarding the parties' intent to establish a monthly billing cycle, rather than to delay payment until the end of the five year contract term. *See Matsushida* [sic] *Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). As a result, the Court **GRANTS** Plaintiff's motion to amend this Court's judgment in favor of NUS, filed September 9, 1994, to include $1,342,776.68 in prejudgment interest, with further interest to be paid upon the principal sum, at a rate of 9% per annum from September 15, 1994 until the judgment is paid.

Dated: December 14, 1994

/s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5644

NATIONAL UTILITY SERVICE, INC.

v.

SAVANNAH FOODS & INDUSTRIES, INC.,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-02891)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, *Circuit Judges*

The petition for rehearing filed by the appellant, Savannah Foods & Industries, Inc., in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: August 1, 1995

Supreme Court, U.S.
FILED
DEC 1 1995
CLERK

No. 95-707

In The

Supreme Court of the United States

October Term, 1995

SAVANNAH FOODS & INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL UTILITY SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a party is entitled to summary judgment in a state law breach of contract action where (a) there are no genuine issues of material fact that the substantive requirements of the contract under governing state law have been performed, and (b) the issues raised by the nonmoving party relate only to defenses that are legally insufficient under governing state law.

STATEMENT UNDER RULE 29.6

Respondent, National Utility Service, Inc., has no parent company and no non-wholly owned subsidiary. It is not publicly held.

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OPINIONS BELOW

Both the Opinion of the United States Court of Appeals for the Third Circuit and the Opinion of the District Court of New Jersey are endorsed to be "Not for Publication." The Judgment of the Court of Appeals is published at 61 F.3d 895 (1995).

STATEMENT OF THE CASE

Respondent submits this Brief in Opposition to the Petition for a Writ of Certiorari (the "Petition") filed by Petitioner. This Brief in Opposition provides Respondent's reasons for denying the Petition, and addresses specific perceived misstatements and omissions of fact and law in the Petition.

A. Procedural History

This is an action for services rendered under an energy cost consulting agreement in which state law governs. The District Court granted summary judgment in favor of the consultant, National Utility Service, Inc. ("Respondent"). Its customer, Savannah Foods & Industries, Inc. ("Petitioner"), appealed to the Court of Appeals for the Third Circuit, which dispensed with hearing argument and affirmed. Petitioner filed a Petition for Panel Rehearing and Suggestion for Rehearing In Banc; that Petition was denied. Petitioner then applied to the Court of Appeals for a stay of issuance of the mandate. That application was also denied. Petitioner then applied to Justice David H. Souter for a stay upon the grounds that

(a) there is a "reasonable probability" that four Justices will consider the issues sufficiently meritorious to grant certiorari; (b) there is a "fair prospect" that a majority of the Court will conclude that the decision below was erroneous; and (c) irreparable injury is likely to result from denial of a stay. Justice Souter denied Petitioner's application for a stay. The issue of post-judgment interest remanded by the Court of Appeals has been resolved by the entry by the District Court of a stipulated amended judgment.

B. Statement of Facts

Respondent adopts the summary of the facts contained in the unpublished Opinion of the Court of Appeals, filed June 29, 1995 (Pet. App., 2a-5a), and the section entitled "Background" in the District Court's unpublished Opinion (Pet. App., 14a-19a).

Pursuant to Sup. Ct. Rule 15.2, Respondent also provides the following corrections of perceived misstatements of fact and law and omissions of significant facts in Petitioner's Statement of the Case (Petition, 3-5).

1. Petitioner omits that recommendation "4" in the report sent by Respondent to Petitioner in April, 1985 (the "April 1985 Report") suggested that Petitioner investigate receiving natural gas from wellhead producers if its gas supplier, Southern Natural Gas Company ("Southern"), was unwilling to renegotiate its contract with Petitioner (Pet. App., 3a, 16a-17a).

2. Petitioner misstates that the memorandum of Southern's employee, George A. Mattison, IV, dated

March 31, 1986 (the "March 31, 1986 Memo"), "is direct evidence that [Petitioner's] cost savings did not result from the adoption of the recommendation made in April 1985 by [Respondent]." (Petition, 5). Petitioner omits that on August 9, 1985 (following its receipt of the April 1985 Report), it was taking the course of action of renegotiating its gas purchase contract with Southern as the April 1985 Report recommended (A 791),[1] and that on September 11, 1985 (less than five months after the April 1985 Report), Eugene G. Clarke ("Clarke"), Petitioner's Chief Engineer (who reported directly to George Fawcett, its Vice President of Operations and a recipient of the April 1985 Report) (A 414-15), wrote to Southern "to determine how [Petitioner] can best approach the use of transportation gas."[2] (A 794).

Thus, Petitioner omits that Clarke's letter is direct evidence that Petitioner took the course of action recommended by Respondent, to wit; after Southern expressed an unwillingness to renegotiate Petitioner's gas purchase contract, Petitioner acted to investigate ways to receive transportation gas. The March 31, 1986 Memo, partially quoted in the Petition, merely recorded Southern's meeting with Clarke to implement the transportation gas recommendation contained in the April 1985 Report and subsequently reiterated by Respondent.

3. In attributing the gas cost savings to Southern's effort to replace sales of gas that it would have lost if

---

[1] "A___" refers to the parties' Joint Appendix in the Court of Appeals.

[2] "Wellhead gas" and "transportation gas" are interchangeable terms. (A 404)

Petitioner used alternative fuels, Petitioner omits informing this Court that the April 1985 Report suggested that Petitioner renegotiate its gas purchase contract with Southern by using its threat to stop buying Southern's gas as a strategy and for negotiation leverage (Pet. App., 2a-3a). Thus, Petitioner omits acknowledging this direct evidence that it took the course of action recommended by Respondent.

4. Petitioner misstates Respondent's recommendation (Petition, 11). Respondent recommended that Petitioner "investigate ways of receiving [its] natural gas from various wellhead producers, depending on the outcome of FERC's hearing concerning 'mandatory carriage'." (Pet. App., 3a). Clearly, Respondent recommended that Petitioner *investigate* receiving wellhead gas, and Petitioner did so, by thereafter successfully negotiating ways to receive wellhead gas pursuant to an individual certificate under Section 7(c) of the Natural Gas Act of 1938. 15 U.S.C. §§ 717, *et seq.*

SUMMARY OF REASONS FOR DENYING THE WRIT

This is a simple diversity jurisdiction state law contract action. It contains no unsettled federal issue and no constitutional issue. In fact, it contains no substantive issue of federal law at all. The Court of Appeals did not misapply Supreme Court precedent and did not act in any way as to require the exercise of the Supreme Court's supervisory power.

Petitioner's "Question Presented for Review" and "Reasons for Granting the Writ" (Petition, 5-15) assumes

that the lower courts found that the Agreement requires Respondent to prove what part its April 1985 Report played in Petitioner's later decision to receive transportation gas. However, the lower courts found that the Agreement is unambiguous and simply does not require Respondent to prove any causative part its April 1985 Report played in Petitioner's decision. The lower courts drew no inferences from the evidence, either in favor of Respondent or against Petitioner. Therefore, the Petition misconstrues the lower courts' Opinions. Since the lower courts did not rely exclusively on inconclusive circumstantial evidence when they granted and affirmed summary judgment, the "Question Presented for Review" is not raised by the decisions below or supported by the Record.

Besides misstating the legal analysis applied by the lower courts, Petitioner has not set forth a compelling reason for this Court to readdress the summary judgment standard that applies when the movant has the burden of proof. This case involves no area of conflict among the circuit courts regarding the well-settled standard for granting summary judgment to a moving party and the standard for granting summary judgment against a non-moving party with the burden of proof. Additionally, Petitioner has failed to demonstrate that the lower courts have had difficulty in applying Supreme Court precedent on Fed. R. Civ. P. 56, or that the lower courts in this case misapplied that precedent.

REASONS FOR DENYING THE WRIT

POINT I

PETITIONER'S "QUESTION PRESENTED FOR REVIEW" IS NOT RAISED BY THE THIRD CIRCUIT'S DECISION

This is a state law breach of contract action for services rendered. New York State substantive law was applied. As shown by the manner in which Petitioner litigated this case in the courts below, Petitioner's real dispute is with the way the lower courts applied New York's substantive law. The Court of Appeals' unpublished Opinion reveals that Petitioner did not frame its appeal as presenting a specific legal question regarding the meaning of Fed. R. Civ. P. 56, or as providing the Court of Appeals with an opportunity to fill in perceived inadequacies in the following Supreme Court precedent on Rule 56: *Kodak v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Rather, because Petitioner appealed the case to the Court of Appeals as presenting a fact-specific question unique to these parties, the lower court had no reason to address the question presented as presently formulated by Petitioner.

Additionally, Petitioner's "Question Presented for Review" is based upon the faulty premise that, under state contract law found and affirmed by the lower courts, the Agreement requires Respondent to prove that it was the cause of Petitioner's energy cost savings, and

that summary judgment was based *exclusively* on inconclusive inferences drawn on that issue. However, the lower courts agreed that, as a matter of state law, the Agreement does not require Respondent to prove the state of mind that caused Petitioner's purchase of transportation gas.[3] Thus, the "Question Presented for Review" is not even raised by the lower courts' Opinions or supported by the Record.

After holding that the Agreement was "a facially simple and unambiguous expression of agreement between the parties" (Pet. App., 31a), the District Court addressed and rejected Petitioner's defenses including, *inter alia*, that despite the publication to Petitioner of Respondent's April 1985 Report, it independently conceived of the idea of the purchase of transportation gas, stating:

> [I]t *makes no difference* what [Petitioner] did to reduce its utility expenses after it entered into the Agreement with [Respondent]. Once the Agreement was executed, [Petitioner] worked independent of [Respondent] at its own risk.

(Pet. App., 31a (emphasis added)). The District Court found that "[t]he Agreement requires that [Respondent] need only make a recommendation in order to qualify for payment if its recommendation was thereafter successfully used by [Petitioner]." (Pet. App., 31a). Thus, the lower courts determined that proof of causation between the recommendation and the state of mind resulting in

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[3] The Court of Appeals adopted the District Court's Opinion on the issue of liability. It therefore drew no inferences on the issue of causation (Pet. App. 6a).

the decision to take the recommended action is not a substantive requirement of the Agreement.

Judge Cabranes, in construing similar contractual language, reached the same conclusion in *National Utility Service, Inc. v. J. R. Sexton, Inc.*, 1989 WL 343048 (D. Conn., November 3, 1989),[4] stating, at App., 5a:

> The court finds that the language of the contract is unambiguous. The contract states that any recommendation acted on shall be deemed accepted. This language unambiguously means that if [Respondent] recommends a course of action and [the client] subsequently takes that course and achieves utility bill savings as a result, [the client] is obligated to compensate [Respondent]. The contract nowhere suggests or envisages an inquiry into the state of mind of [the client] or its officials to determine the degree to which they were influenced by factors other than [Respondent's] report to adopt the course of action recommended by [Respondent].

See also, National Utility Service, Inc. v. Callahan Mining Corp., 799 F.Supp. 1004 (N.D. Cal. 1990) (proof of causation between Respondent's advice and energy cost savings is not required by the agreement).

Therefore, it is immaterial whether Respondent's recommendation was a factor in Petitioner's state of mind that caused it to take the same action recommended by Respondent. It is also immaterial whether allegedly different regulatory and market conditions may have encouraged Southern to accede to Petitioner's request for

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[4] A copy of the court's opinion in *National Utility Service, Inc. v. J. R. Sexton, Inc.* is annexed as Respondent's Appendix.

transportation services, as anticipated in the April 1985 Report. Under the substantive law of New York, the only facts material to Respondent's claim for breach of the Agreement are whether Petitioner took the course of action after it was recommended by Respondent and whether it thereafter realized gas cost savings. Because there was no genuine issue regarding these material facts, summary judgment was appropriate.

Petitioner uses a fact issue that the lower courts held was immaterial as a matter of state substantive law to create an argument that the lower courts wrongly decided an issue of federal procedural law. Because a) the Agreement did not require Respondent to prove causation as an element of its claim, b) no inferences (either in favor of Respondent or against Petitioner) were drawn by the lower courts, and c) the lower courts did not rely exclusively on inconclusive circumstantial evidence when they granted and affirmed summary judgment to Respondent, the Petitioner's "Question Presented for Review" is not raised by the decision below or supported by the Record.

POINT II

THE COURT'S PRIOR DECISIONS ON THE STANDARD FOR GRANTING SUMMARY JUDGMENT ARE CONTROLLING, HAVE BEEN APPLIED CONSISTENTLY BY THE LOWER COURTS, AND WERE APPLIED PROPERLY IN THIS CASE

A. The standard on summary judgment is clear and well established.

In 1986, this Court decided a trilogy of cases that marked the new era in summary judgment motion practice: *Anderson v. Liberty Lobby, Inc., supra; Celotex Corp. v. Catrett, supra;* and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., supra.* According to then Justice Rehnquist, this trilogy of cases signalled to courts and practitioners that summary judgment would no longer be viewed "as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett,* 477 U.S. at 327. Now, when that signal has been received and implemented without difficulty by the lower courts, Petitioner argues that the salutary effect of summary judgment should be curtailed in cases such as this one. Without presenting compelling, or even applicable reasons, Petitioner urges this Court to revisit its summary judgment standard.

Petitioner misstates that this Court has never addressed the summary judgment standard to be applied when the movant has the burden of proof. In *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 251, this Court analogized summary judgment policy to the policy applicable in a

motion for a directed verdict, and reached back to a series of cases, beginning with *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872), which held that before a case may be presented to a jury, it is a preliminary question for the judge to determine whether a jury could properly find for the party "upon whom the onus of proof is imposed (footnotes omitted)." Thus, while the movant must show that there is no genuine issue of material fact, the party opposing the motion is not relieved of its burden of producing evidence that would support a jury verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256. As succinctly stated by then Justice Rehnquist in *Celotex Corp. v. Catrett*, 477 U.S. at 322-23:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case concerning which she has the burden of proof.

B. Supreme Court precedent on summary judgment is consistently applied.

Petitioner requests this Court to review an issue that has been comprehensively addressed previously and which has created no conflicts, disagreements or difficulties in the lower courts.

Petitioner cites several lower court decisions as recognizing a distinction between the standard for granting summary judgment to a moving party with the burden of proof and the standard for granting summary judgment against a nonmoving party with the burden of proof. Significantly, these cases uniformly state that the summary judgment standard of this Court's trilogy of cases applies when the movant has the burden of proof. Supreme Court review of this issue is, therefore, unwarranted. *Compare Anchorage Associates v. V.I. Bd. of Tax Review*, 922 F.2d 168, 175 (3d Cir. 1990) ("Where the moving party has the burden of proof on the relevant issues . . . the District Court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law."); *Local Union 42 v. Absolute Environmental Serv., Inc.*, 814 F.Supp. 392 (D. Del. 1993) ("When the moving party seeks summary judgment based on a claim or defense upon which the moving party bears the ultimate burden of proof at trial, the moving party must establish every element of that claim or defense as a matter of law such that no reasonable jury could return a verdict for the nonmovant."); *Vigars v. Valley Christian Center*, 805 F.Supp. 802, 805 (N.D. Cal. 1992) ("Where the moving party will have

the burden of proof on an issue at trial, she must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party."); and *Hickson v. Home Federal of Atlanta*, 805 F.Supp. 1567, 1574 (N.D. Ga. 1992), *aff'd*, 14 F.3d 59 (11th Cir. 1994) ("[W]here the movant is the plaintiff, that party must demonstrate the absence of an issue of material fact with regard to every element essential to his or her claim.") *See also Watts v. United States*, 703 F.2d 346 (9th Cir. 1983).

Each lower court cites one or more of this Court's trilogy of summary judgment cases and reaches the same conclusion on the standard applicable to a motion for summary judgment where the movant has the burden of proof. Those lower courts do not suggest that they need Supreme Court guidance on this issue, and they do not indicate that the standard is unsettled or unclear. The standards set by this Court in 1986, and reaffirmed thereafter, are being applied consistently.

C. Supreme Court precedent on summary judgment was applied properly by the lower courts in this case.

Neither the Court of Appeals nor the District Court misapplied Supreme Court precedent on Fed. R. Civ. P. 56. The District Court articulated the summary judgment standard when it stated:

> Whether a fact is material is determined by the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue involving a material fact is genuine "if the evidence is such that a reasonable jury could return

> a verdict for the nonmoving party." (citation omitted).
>
> The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party satisfies this requirement, the burden shifts to the nonmoving party to present evidence that there is a genuine issue for trial. *Id.* at 324.

(Pet. App., 19a-20a).

In applying this standard, the lower courts determined that the only material facts are whether Petitioner took the course of action after it was recommended by Respondent and whether it thereafter realized utility cost savings (Pet. App., 30a-31a). Because there was no genuine issue regarding these material facts, the burden was upon Petitioner, as the party opposing summary judgment, to present evidence that there was a genuine issue of fact material to some legally sufficient defense. Petitioner failed to sustain its burden because its evidence consisted exclusively of immaterial arguments to support legally insufficient defenses.

In summary, this Court's prior decisions are comprehensive and controlling, the lower courts have applied those decisions consistently, and the lower courts in this case applied those decisions correctly. When considering these factors together with Petitioner's failure to assert any compelling reason for further review by this Court, it must be concluded that the Petition should be denied.

POINT III

BECAUSE THE COURT OF APPEALS DID NOT REWRITE, BUT MERELY EXPLAINED RESPONDENT'S RECOMMENDATION, THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION TO REVIEW THIS STATE LAW CONTRACT DISPUTE

Petitioner requests this Court to review a decision on a state law contract dispute that has already been reviewed by the Court of Appeals. Especially where, as in this case, there is no burning question of federal law or public policy to be formulated or clarified, the Court should deny Petitioner's application.

Petitioner seizes upon the word "implication" in the Court of Appeals' discussion of Respondent's recommendation and urges this Court to exercise its extraordinary supervisory power. To support its argument, Petitioner misstates that the word "implication" shows that the lower court "rewrote the recommendation to support a summary judgment in favor of [Respondent]." (Petition, 14). When viewed in context, however, clearly the Circuit Court's discussion of Respondent's recommendation simply used the word "implication" as a synonym for "connotation," or "effect."

In its summary of the facts, the Court of Appeals quoted the five approaches for gas cost savings recommended by Respondent in its April 1985 Report. Recommendation 4 stated that Petitioner "should investigate ways of receiving [its] natural gas from various wellhead producers, depending on the outcome of FERC's [Federal Energy Regulatory Commission's] hearing concerning 'mandatory carriage'." (Pet. App., 3a). In discussing that

recommendation, the Court of Appeals stated that it understood that "mandatory carriage" referred to proposed regulations requiring natural gas companies to provide "for transmission of gas not owned by them through their pipelines." (Pet. App., 3a). The lower court then stated that the "implication" of the recommendation is that Petitioner's contract with Southern should be renegotiated "to [provide] for Southern to transport wellhead gas that [Petitioner] purchased from other producers." (Pet. App., 3a-4a). Considering that this recommendation identifies Southern as Petitioner's gas company, the "implication," connotation or effect is clear that Southern would become the transporter of gas which [Petitioner] purchased from others.

The Court of Appeals did not rewrite the recommendation. It did not find that Respondent was "entitled to a favorable 'implication' from" the language of the report (Petition, 14). The lower court merely described the recommendation.

The recommendation was not a contract. Thus, the cases cited by Petitioner that the courts lack the power to rewrite contracts are inapposite. Even assuming, *arguendo*, that the lower courts were construing the Agreement, that act of construing the Agreement was governed by state contract law principles. Petitioner's claim that the lower courts applied those principles incorrectly does not merit the extraordinary exercise of this Court's supervisory powers.

There is no need for this Court to exercise its power of supervision because the lower courts did not rewrite the recommendation or the Agreement. There was no

departure from the accepted and usual course of judicial proceedings by the lower courts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Dated: December 1, 1995

Respectfully submitted,

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APPENDIX

NATIONAL UTILITY SERVICE, INC.

v.

J.R. SEXTON, INC.

Civ. No. N-88-324(JAC).

United States District Court, D. Connecticut.
Nov. 3, 1989.

RULING ON PENDING MOTIONS

JOSE A. CABRANES, District Judge:

This case involves a contract between plaintiff NATIONAL UTILITY Service, Inc. ("N.U.S."), a utility analyst and consulting service, and defendant, J.R. SEXTON, Inc. ("SEXTON"). Under this agreement N.U.S. undertook to analyze SEXTON'S utility usage and submit recommendations of means to effect utility cost savings. If SEXTON implemented any such recommendation, in addition to an initial fee of $5,000 it was to transmit its utility bills to N.U.S. so that resulting savings could be determined. After the amount of $5,000 in savings was realized, defendant was to pay plaintiff 50% of its utility bill savings for 60 months. Plaintiff alleges that defendant implemented plaintiff's recommendations but failed to fulfill its obligations under the contract to pay its fees and to transmit its utility bills to plaintiff to allow a determination of amounts of money owed.

Plaintiff alleges breach of contract (Count 1), unjust enrichment (Count 2), and violation of the Connecticut Unfair Practices Act (CUTPA), C.G.S. ss 42-110(a) et seq. (Count 3). Plaintiff seeks compensatory and punitive damages, attorney's fees, a declaratory judgment, and specific performance.

Currently before the court are two motions, Plaintiff's Motion for Summary Judgment (filed Sept. 15, 1989) and Defendant's Motion for Summary Judgment Against Plaintiff, National Utility Service, Inc. (filed Sept. 15, 1989). The latter motion is addressed solely to the CUTPA claim in Count 3 of the complaint and is thus deemed a motion for partial summary judgment.

For the reasons stated below, plaintiff's motion for summary judgment is granted in part, as to liability for Count 1 (breach of contract) and denied in all other respects. Defendant's motion for partial summary judgment as to the CUTPA claim is granted. These claims shall be addressed, in turn, below.

DISCUSSION

Summary Judgment Standards

The court may grant summary judgment where the moving party has demonstrated that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."). A motion for summary judgment thus is the appropriate vehicle "to isolate and dispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

In making a summary judgment determination, the court must resolve all ambiguities and draw all reasonable inferences in favor of the plaintiff. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255; Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir.1986) (Feinberg, C.J.), cert. denied, 480 U.S. 932 (1987). The court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, a party may not "rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." Knight v. U.S. Fire Ins. Co., 804 F.2d at 12. Mere conclusory allegations and denials in legal memoranda or oral argument are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist. See Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir.1980); British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir.1978), cert. denied, 440 U.S. 981 (1979). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

Claim of Breach of Contract

Plaintiff claims it is entitled to judgment as a matter of law as to the claim of breach of contract. Defendant responds by alleging that the contract between the parties is ambiguous in relevant part and therefore a genuine issue of material fact exists as to whether Sexton's actions in refusing payment constituted a breach of that contract. In particular, defendant claims that a disputed question

exists as to whether Sexton adopted N.U.S.' recommendation regarding utility usage.

It is not disputed that Sexton made a change identical to that recommended by N.U.S., namely, it arranged to purchase natural gas under an "interruptible rate." It is also undisputed that this change was made subsequent to the receipt of the N.U.S. report. In fact, Sexton's letter to the utility company requesting the interruptible rate was identical, save for the substitution of Sexton's letterhead, to the suggested letter enclosed for this purpose in the N.U.S. report. Sexton claims that this does not constitute an adoption of the recommendation in the N.U.S. report envisaged by the agreement because the same change of service was previously recommended to them by their utility company and it was the recommendation of the utility company, and not of N.U.S., that caused Sexton to make the change.

The relevant language in the contract provides that, [a]ny [N.U.S.] recommendation acted on by [Sexton] shall be deemed accepted. . . . [N.U.S] will not share in any reductions or savings effected solely by the lowering of rate schedules of any public utility corporation which they voluntarily apply to [Sexton's] bills and which are not influenced by [N.U.S.'] prior recommendations to [Sexton]. [Sexton] will pay [N.U.S.] only for savings which actually become effective on [Sexton's] bills after [N.U.S.'] recommendation is implemented. (emphasis added).

Sexton claims that this language is ambiguous and permits more than one fairly reasonable interpretation and that summary judgment is thus inappropriate. See

Aetna Casualty & Surety Co. v. Geiesow, 412 F.2d 468, 471 (2d Cir.1969). See also, e.g., Grand Union Co. v. Cord Meyer Development Corp., 735 F.2d 714 (2d Cir.1984). N.U.S. interprets the contract to mean that all recommendations made by N.U.S. that were subsequently acted upon by Sexton give rise to obligations under the contract. Sexton proposes that the contract can also be interpreted to mean that only "exclusive" recommendations by N.U.S., i.e., those not available from any other source, if adopted by Sexton, give rise to contractual obligations.

The court finds that the language of the contract is unambiguous. The contract states that any recommendation acted on shall be deemed accepted. This language unambiguously means that if N.U.S. recommends a course of action and Sexton subsequently takes that course and achieves utility bill savings as a result, Sexton is obligated to compensate N.U.S. The contract nowhere suggests or envisages an inquiry into the state of mind of Sexton or its officials to determine the degree to which they were influenced by factors other than the N.U.S. report to adopt the course of action recommended by N.U.S.

The court finds that, in light of the undisputed facts of this case, there are no genuine issues of material fact as to Sexton's obligations under the contract. It is also undisputed that Sexton did not forward its utility bills to N.U.S. for determination of amounts owed or make payments of any kind to N.U.S. Summary judgment is thus appropriate as to defendant's liability for breach of contract.

The court finds, however, that genuine issue of material fact exists as to the amount of damages. Plaintiff has the burden of proof on the issue of the amount of its damages. N.U.S. claims damages in the amount of $58,764.75. See Affidavit in Support of Plaintiff's Motion for Summary Judgment (filed Sept. 15, 1989) at 7. This number is not explained and no basis for the calculation used to reach it is provided. In view of the current state of the pleadings, summary judgment is not appropriate as to damages due to N.U.S. for Sexton's breach of contract.

Claim of Unjust Enrichment

Neither the plaintiff's nor the defendant's motion makes any reference to this claim. Thus summary judgment is not appropriate on this issue.

CUTPA Claim

Defendant seeks summary judgment as to the claim of violation of CUTPA, C.G.S. ss 42-110(a), et seq. Sexton argues that plaintiff cannot maintain a private right of action under CUTPA because the alleged conduct of defendants does not rise to the level of being offensive to public policy, immoral, unethical, oppressive, or unscrupulous, and it does not cause substantial injury to consumers.

The relevant section of CUTPA provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." C.G.S. s 42-110b. The Supreme Court

of Connecticut has defined "unfairness" as (1) whether the practice . . . offends public policy as it has been established by statutes, the common law, or otherwise . . . ; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (competitors or other businessmen). Ivey, Barnum & O'Mara v. Indian Harbor Properties, Inc., 190 Conn. 528, 539 n. 13 (1987) (citations omitted). Nevertheless, a practice may be "unfair" even if all three criteria are not met. See McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558 (1984); Gibbs v. Mace, 11 Conn.App. 289, 296 (1987).

N.U.S. concedes that Sexton's breach of contract alone is not sufficient to establish a CUTPA violation. See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Partial Summary Judgment (filed Oct. 6, 1989) at 3. However it claims that "the totality of Sexton's egregious conduct," id., renders it liable under CUTPA. The court finds this argument unpersuasive. The "totality" of Sexton's conduct, as it emerges from the undisputed facts of this case, constitutes merely breach of contract and persistence in that breach in face of demands for performance by the other party to the contract. N.U.S. offers no evidence to indicate that the breach of contract at issue violated any "established concept of fairness." See Sorisio v. Lenox, Inc., 701 F.Supp. 950, 963 (D.Conn.1988) (Burns, J.). Summary judgment on this count is thus appropriate.

CONCLUSION

For the reasons stated above and upon a full review of the record, Plaintiff's Motion for Summary Judgment (filed Sept. 15, 1989) is GRANTED IN PART, as to liability on Count 1 (breach of contract) and DENIED in all other respects. Judgment as to liability only on Count 1 shall enter in due course for plaintiff. Defendant's Motion for [Partial] Summary Judgment Against Plaintiff, National Utility Service, Inc. (filed Sept. 15, 1989) is GRANTED. Judgment for defendant shall enter in due course on Count 3 of the complaint.

It is so ordered.